CRIMINAL LAW Murder - Conviction for Manslaughter - Self defence - Whether misdirection - whether duty to retreat - whether trial judge erred in requiring jury to give reasons for verdict - whether acquittal of manslaughter given by judge defective.

[HELD Judge misdirected as to duty to retreat and thereby denied appellant of a real chance of acquittal. Appeal allowed on this ground.]

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 17/86

Cases referred to:
R v Mc Innis (1971) Cr App R 551
Palmer v R (1971) 55 Cr App R 223; 12 JLR 311
R v Julien (1969) 53 Cr App R 407
R v Bartley (1970) 14 WIR 407
R v Belnavis (1964) 8 WIR 128
R v Matheson (1958) 42 Cr App R 145
R v Browne (1952) 36 Cr App R 125
R v Burton CA 33/86 - 6/2/87 unreported
R v Warner (1967) 51 Cr App R 437
R v Abgum (1970) Crim Law Review 171

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

R. v. STANLEY BROOKS

K.D. Knight and Robert Pickersgill for appellant
Miss Jennifer Straw for the Crown

March 18, 19 & April 27, 1987

ROWE, P.:

The appellant was tried in February, 1986, for the murder of Melbourne Thompson. A verdict of guilty of manslaughter was returned and from that verdict and sentence of 10 years hard labour he applied for leave to appeal to this court. His application was treated as the hearing of the appeal, the appeal was allowed, the conviction quashed, sentence set aside and a verdict of acquittal entered. Herein are our reasons for allowing the appeal.

It was a very short case with one witness of fact for the prosecution supported by a witness who identified the body, the doctor who performed the post-mortem examination and the arresting officer. The appellant gave sworn evidence and did not call any witnesses. There followed a

summing-up of 56 typewritten pages. We think that the issues involved did not require this length of elaboration and that the jury would be better assisted with a full and clear exposition of the law stated once only and that needless repetitions should have been studiously avoided.

One Mr. Bailey giving evidence for the prosecution recounted how the deceased came to the Columbus bar on Maxfield Avenue on Saturday, July 28, 1984, about 6:30 p.m. and enquired for the appellant who was not then present. Bailey said the deceased appeared vexed and was "screwing up his face" while he stood there, apparently waiting for the arrival of the appellant, who indeed showed up some 10 minutes later. There followed a conversation between the two men, the gist of which was that the deceased was asking the appellant for a battery, and this the appellant said, was at Berwick Road and he would get it. Words passing between the deceased and the appellant were not of the most polite kind as they included curse words on both sides. Bailey swore that he saw the deceased flash his two hands at the appellant saying, "Go for the battery." The deceased, he said, had nothing in either hand when he flashed them at the deceased, whose response was to take a knife from his back pocket, and chuck the deceased with the knife in his left breast. Bailey said that the deceased ran off, picked up a stone but before he could make any use of it, he collapsed to the ground still holding the stone in his hand. The deceased received a stab wound 1" long by ½" wide 2" deep in the middle of the chest which injured the ensiform cartilage and the cartilage of the ninth rib on the right side and caused an incised wound to the right

ventricle of the heart, and he died from shock and haemorrhage.

In his defence the appellant put forward this account. He was pushing a cart up Maxfield Avenue containing groceries and a bunch of bananas. A woman called to him and he pushed his cart across the street to speak with her. Just then the deceased, whom he did not know before, and who had the appearance of a ruffian, ran with a good size stone and pushed him in his forehead with this stone. The woman pushed the deceased away. The deceased "fly around back to him" pushed him again in his forehead with the stone and said, "Boy where you a go." This series of movements involving the appellant, the deceased and the woman was repeated five times. In the process, said the appellant, he tried to get away by pushing off his cart three times, but each time the deceased confronted him and prevented him from getting away. The lady advised the deceased to "Leave the man and go your ways;" but the deceased's response was, "Hey boy, you facety, telling me 'bout me people dem." This drew a response from the appellant who told the deceased that he was the "facety" one. The exchange of words continued, and the deceased on one of the occasions when he ran at the accused said, "I going to lick you down", and finally the deceased said, "Hey boy, a going to flatter you whats-it whats-it whats-it-not." At this time the deceased had the stone held above his head and his hands were coming down towards his face with the stone. The appellant said he had taken his knife from his back pocket while the deceased was threatening him, and now when he saw the stone about to descend on his face, he made a "coward swing" with his knife and was not aware if the knife had inflicted any injury. His swing prevented the man from hitting him, and the last he saw of the deceased

was when he went off raging down Maxfield Avenue. Upon arrest the appellant had no sign of injury to his forehead.

The jury were directed on the issues of self-defence, provocation and lack of intent to kill or to cause grievous bodily harm. Arising out of these directions counsel for the appellant argued five grounds of appeal. In the first ground the complaint was that the trial judge misdirected the jury on the issue of self-defence thereby depriving the applicant of a real chance of acquittal. Mr. Pickersgill submitted that the learned trial judge concentrated his directions on the reasonableness of the measures taken by the appellant in self-defence, rather than upon his assertion that he was purporting to act in self-defence. He said too, that the judge's directions on the necessity to retreat were inappropriate and misleading.

In R. v. McInnis [1971] 55 Cr. App. R. 551, it was held that where the issue of self-defence arises, the failure of the defendant to retreat when it was possible and safe for him to do so is simply a factor to be taken into account in deciding whether it was necessary for the defendant to use force, and whether the force used by him was reasonable. The court followed Palmer v. R. [1971] 55 Cr. App. R. 223; 12 J.L.R. 311; R. v. Julien [1969] 53 Cr. App. R. 407. A person does not have to take to his heels and run away if to do so would expose him to the danger of the injury. But as Lord Morris of Borth-y-Gest, said in Palmer's case:

> "It may in some cases be only sensible and clearly possible to take some simply avoiding action."

These decisions are important to show that there is now no general duty to retreat in all cases where self-defence is raised. In R. v. Bartley [1970] 14 W.I.R. 407.

Waddington J.A. drew a distinction between killing in self-defence - excusable homicide - and killing in defending oneself from the commission of a forcible and atrocious crime, e.g. buggery - justifiable homicide - and said that in self-defence (excusable homicide) cases there is generally a duty to retreat. Bartley's case should now be read together with the decision of the Privy Council in Palmer's case. We wish to endorse too the statement of the law on the relevance of "retreat" in self-defence as given by Lewis J.A. in R. v. Belnavis [1964] 8 W.I.R. 128 at 131 when he said:

> "A person who is attacked or reasonably apprehends an imminent attack is entitled to defend himself by the use of such force as is reasonably necessary. The possibility of retreat is only one of the relevant factors which the jury is entitled to consider in deciding whether the degree of force used in self-defence was reasonably necessary in the circumstances."

R. v. Belnavis, supra, was a case in which the appellant said he saw the deceased approaching him with a bottle and a knife calling out in the meantime, "He think I run but I didn't run, if I see him I would kill him tonight", and he, the appellant, believing that the deceased intended to kill him, bent down, picked up a stone and threw it at him. The stone caused an injury to the deceased from which he died. In his summation to the jury the learned trial judge had stressed the obligation to retreat. At one point he told the jury:

> "What the law says is, if you can run away, you must run away, and I must emphasize again that you must consider this question as it arises out of the account which the accused himself gave. ..... Perhaps, you may think that if he had all this time to bend down in the water table, pick up a stone, you would be entitled to enquire even at that stage instead of bending down and picking up a stone why didn't he run away? You would be entitled to go further - why didn't he run away when he

> "realised that that the deceased had gone to the truck and armed himself with a knife and bottle. Why stand there?"

Of these directions, Lewis J.A. said:

> "We feel that this undue stress which the learned trial judge placed upon what he described as an obligation on the appellant to run away must have had the effect of diverting the jury from the true questions which arose in the case, whether in the circumstances the appellant might reasonably have anticipated an imminent attack upon him which would cause serious injury to him, and if the jury felt that he might or was in doubt about it, whether in all the circumstances the force which he used was reasonably necessary for the purpose of defending himself against that attack. This, in our view, was a serious misdirection resulting in a substantial miscarriage of justice and this conviction accordingly cannot stand. The appeal is allowed and the conviction and sentenced quashed and the court directs that a verdict of acquittal be entered."

Walker J. in dealing with the issue of retreat invited the jury in no uncertain terms to say that the reasonable thing for the appellant to do was to run away from the deceased. It was a misquotation of the evidence for the judge to tell the jury that the deceased was coming at the appellant with the stone and not saying anything, but the dramatic picture which he painted would call for the appellant to turn his back to a man with a stone and in so doing to expose the vulnerable back of his head to the attacker. Not only did the judge tell the jury that in the circumstances of the attack related by the appellant, he, the learned trial judge, would run, but he expressly invited the jury to say whether or not they too would run and leave the cart. This is how the learned trial judge expressed himself to the jury at p. 44 of the summing-up:

> "Did Melbourne Thompson attack this accused man with a stone that day? You must say whether you believe that or not. If he had been attacked with a stone, could this accused man have taken avoiding action? One of the questions I suggest you ask yourselves, Mr. Foreman and Members of the Jury, if it is true that Melbourne Thompson had this big stone in his hand apparently it was so big that he had to hold it with both hands; it resemble something like a concrete block. If that is true and he was there threatening to harm this accused man with that stone, why didn't the accused man run away even if he had to leave his cart? If you had been pushing a cart, Mr. Foreman and Members of the Jury and out of the blue somebody that you did not know, you cannot remember even having seen before, you had never spoken to before, just keep running at you with a stone, threatening to injure you with the stone, not saying anything, even if you had a cart, wouldn't you leave the cart and run? I would, because in those circumstances it seems to me that you could very well be dealing with a madman, a man who is just running at you with a stone, he does not say anything. That is what the accused man said happened. Could he have run away, and if he could have run away, why stay around? He said he tried to get away with his cart because he says that on every occasion he pushed the cart and tried to move away with the cart, but wouldn't you Mr. Foreman and members of the Jury have run even without the cart? I don't know, that is a matter for you to decide."

We are of the view that the learned trial judge inordinately stressed the requirements of retreat, the effect of which must have diverted the minds of the jury from a proper consideration of the issue of self-defence and deprived the appellant of a real chance of acquittal.

Ground 2 complained that the learned trial judge erred by requiring the jury, in the absence of any ambiguity, to give a reason for their verdict. Just before the jury retired, the judge made this request of them:

> "If you return a verdict of guilty of manslaughter, I am going to ask you Mr. Foreman, afterwards, to tell me whether that verdict of manslaughter is on the basis that this accused man was acting under provocation or it is on the basis that he did not intend to kill or to cause real serious bodily injury, because those are two bases on which you can find manslaughter. So if you do find manslaughter I am going to ask you to tell me on what basis you find it."

Mr. Pickersgill interpreted this request to mean that the trial judge was eroding the supremacy of the jury on issues of fact by requiring them, even before retirement, to tell him the basis of their verdict.

We have observed this incipient practice. It is fraught with danger and should be used only in the most exceptional circumstances. One such exceptional circumstance is when the accused runs the defence of diminished responsibility and provocation in a case of murder, as in that case it is very probable that the sentence will differ materially in the one case from the other. See R. v. Matheson [1958] 42 Cr. App. R. 145 at 153. Goddard L.C.J. in R. v. Browne [1952] 36 Cr.App. R. 125 said that special verdicts ought to be found only in the most exceptional cases in the criminal law. See also R. v. Burton, C.A. 33/86, dated 18th February, 1987, unreported.

Reginald Warner was convicted of the possession of dangerous drugs. After the verdict the trial judge asked the jury if their verdict was based upon the fact that Warner had possession of the drug but did not know. They replied, after some dialogue, that they found him guilty that he knew he had the drugs. Diplock L.J. without so deciding expressed the view:

> "It may well be, as Mr. Frisby submits, that once a jury has brought in a verdict of guilty or not guilty they have performed their function and are entitled to be discharged; and that they are under no obligation to answer any further questions which the judge may put to them, although it is common practice in murder trials for the judge to do that in order to discover what the verdict for manslaughter was."

That appeal was dismissed because the court felt that the judge had come to his own unaided decision, as he said, which was only confirmed by the jury - R. v. Warner [1967] 51 Cr. App. R. 437.

A further reason has been given for the undesirability of the practice of enquiring from the jury the basis of their verdict. R. v. Agbim [1979] Cr. Law Review 171, the court held that:

> "Judges should not ordinarily try to find out why juries had decided as they had. Very occasionally, and in special circumstances judges might ask juries the basis on which they had decided - Matheson [1958] 42 Cr. App. R. 45. Each juror had the responsibility of giving a 'true verdict' according to the evidence. He did not have to take the same view about the details of the evidence as every other juror. What the jury all had to be agreed about, if the verdict was unanimous, was that the prosecution had proved the charge or charges."

In our view judges should proceed upon the verdict as returned by the jury in all but the exceptional cases and we express the hope that the incipient practice which we have observed and of which we herein disapprove , will cease. As a ground of appeal it does not have the force or effect suggested by Mr. Pickersgill.

Grounds three and four were argued together by Mr. Knight. He submitted that in defining manslaughter at p. 48 of the record the learned trial judge fell in error. The judge said:

> "If a man does an act which causes death but at the same time when he does the act he does not intend to kill or to cause really serious bodily injury the offence which he committed is not murder but at the highest manslaughter."

Voluntary manslaughter arises when the crime of murder is reduced to manslaughter by reason of provocation or diminished responsibility. Involuntary manslaughter arises when there is an unlawful killing without intention to kill or to cause serious bodily harm. One instance of involuntary manslaughter is where the killing is the result of an unlawful act, such as an assault, which all sober and reasonable people would inevitably realize must subject the victim to the risk of some harm, whether the accused realised this or not. Archbold's 41st Ed. paras. 20-48 and the cases collected therein.

Mr. Knight argued that the judge did not alert the jury to the fact that the act must be an unlawful one and therefore if the jury believed that the appellant was defending himself his act would not be unlawful. The definition of manslaughter as given by the learned trial judge was defective but had there been a proper direction on the issue of self-defence, we would not have been prepared to allow the appeal on this ground.

The appeal was allowed on the basis of Ground 1.